IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 20, 2006 Session

WANDA KELLER, ET AL. v. MONUMENTAL LIFE INSURANCE COMPANY

Appeal from the Chancery Court for Knox County
No. 161989-3 Sharon Bell, Chancellor

No. E2006-00610-COA-R9-CV - FILED OCTOBER 9, 2006

Charles L. Keller (the "Decedent") was insured through several accidental death insurance policies issued by Monumental Life Insurance Company ("Monumental"). The Decedent was diagnosed with a very rare and often fatal form of prostate cancer, necessitating immediate surgical intervention to remove his prostate. During the surgery, the Decedent's bowel was perforated. The perforation was very small and went undetected by the surgeon despite his visual inspection of the bowel. The perforation eventually caused a bacterial infection necessitating further surgical intervention. Although the perforation was repaired, the Decedent nevertheless died approximately six days later. After Monumental denied coverage under the accidental death policies, the plaintiffs filed suit. Monumental filed a motion for summary judgment, which was denied by the Trial Court. The Trial Court, however, granted Monumental's request for a Tenn. R. App. P. 9 interlocutory appeal which we, in turn, also granted. We reverse the Trial Court's denial of Monumental's motion for summary judgment.

Interlocutory Appeal Pursuant to Rule 9, Tenn. R. App. P.;
Judgment of the Chancery Court Reversed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Judith A. DePrisco and Patty K. Wheeler, Knoxville, Tennessee, for the Appellant, Monumental Life Insurance Company.

A. Philip Lomonaco, Knoxville, Tennessee, for the Appellees Wanda Keller and Charles E. Keller.

OPINION

Background

The Decedent died on January 28, 2003, at the age of 73. At the time of his death, the Decedent had various accidental death insurance policies issued by Monumental in force. This appeal involves whether the Decedent's death was covered by these accidental death policies or whether the manner of his death excluded coverage.

In 1991, the Decedent became insured through two accidental death policies. The combined benefits for these two policies at the time of the Decedent's death totaled $24,937.50. The named beneficiary was Decedent's wife, plaintiff Wanda Keller. The accidental death benefits were payable provided: "(1) death occurs as a direct result of an Injury; (2) death occurs within 365 days of the accident; and (3) death occurs independent of any other contributing cause." The policy defined "Injury" as follows:

> INJURY means bodily injury caused by an accident. The accident must occur while the Covered Member's insurance is in force under the Group Policy. The Injury must be the direct cause of loss and must be independent of all other causes. The Injury must not be caused, or contributed to, by Sickness.

The policy defined "Sickness" as follows:

> SICKNESS means an illness or disease which results in a covered loss while insurance for the Covered Member is in force under the Group Policy.

The policy also contained various exclusions. According to the policy and as relevant to this appeal, no benefits were payable for a loss "which results directly or indirectly, wholly or partly" from:

> (4) Sickness or its medical or surgical treatment, including diagnosis;
>
> (5) bacterial infection except through a wound accidentally sustained;

The Decedent purchased two more accidental death policies from Monumental in 2002. Both of these policies named the Decedent's son, plaintiff Charles E. Keller, as the beneficiary. Benefits under these policies totaled $10,500 at the time of Decedent's death. These policies provided that benefits would be payable provided "(1) death occurs as a direct result of an Injury; and (2) death occurs within 365 days of the accident causing the Injury." These policies contained virtually identical definitions of "Injury" and "Sickness" as were contained in the other policies set forth above, and likewise excluded coverage for "Sickness or its medical or surgical

treatment, including diagnosis" and "bacterial infection except through a wound accidentally sustained."[1]

Dr. Frederick A. Klein ("Dr. Klein") is a urologist with a medical practice in Knoxville, Tennessee. According to Dr. Klein's affidavit, he began treating the Decedent in 1993 when it was discovered that the Decedent had a benign tumor on his prostate. Dr. Klein continued to treat the Decedent over time, and when the Decedent began having new problems in 2002, Dr. Klein performed a transurethral vaporization of the prostate. A pathology report revealed that the Decedent suffered from Prostatic Leiomyosarcoma, which Dr. Klein described as "an extremely rare form of prostate cancer" with a "poor prognosis." Dr. Klein concluded that the Decedent's only chance for survival was an operation to remove the "very enlarged prostate." Dr. Klein then described the following events:

> At the time of surgery, Mr. Keller's "prostate was huge and at least the size of a grapefruit." [(University Urology No. 000089)][2] However, "with some difficulty, the prostate was then removed." (Id.) Prior to closure of the operative site, I visually inspected Mr. Keller's rectum for any perforation and found no perforations.
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> The patient recovered well until January 21, 2003, at which time Mr. Keller developed an elevated temperature, an increase in his blood temperature, and bloody diarrhea. (University Urology No. 000076-000078.) Mr. Keller was transferred to the intensive care unit by Dr. Kim, who was on call on January 21, 2003. (Id.) On January 22, 2003, I took Mr. Keller back to the operating room. (University Urology No. 000071.) With the patient under general anesthesia, a "rectal exam revealed a small perforation in the anterior wall less than one to two centimeters inside the dentate line." (Id.) I opened the abdomen through the previous incision and performed an exploratory laparotomy and irrigation. During the procedure, the small perforation was repaired. (Id.) Intraoperative consultation and assistance was provided by Dr. Gallaher and Dr. Taylor, who performed a diverting loop colostomy. (Id.) Mr. Keller subsequently expired on January 28, 2003.

This litigation began when the Decedent's wife and son ("Plaintiffs") filed suit claiming Monumental had improperly denied coverage under the accidental death policies. Plaintiffs sought damages equal to the amount of the policies, plus an additional 25% as a bad faith penalty.

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[1] Although the definitions in the various policies are not always identical, the parties acknowledge that any differences are not material to the resolution of the issues on appeal.

[2] The quotations and citations contained in Dr. Klein's affidavit are from the Decedent's medical records.

Monumental filed a motion for summary judgment claiming the cause of the Decedent's death was not covered by the accidental death policies at issue. More specifically, Monumental claimed the Decedent's death was the direct result of "sickness or its medical or surgical treatment" and, therefore, the manner of Decedent's death fell squarely within this exclusion. Plaintiffs claimed the manner of death was not excluded from coverage because the death was the result of an accident which took place when Dr. Klein accidentally perforated the bowel during the surgery to remove the Decedent's prostate.

The Trial Court denied Monumental's motion for summary judgment, stating simply that there was a genuine issue of material fact regarding whether the Decedent's death was covered by the insurance policies. Monumental then filed a Tenn. R. App. P. 9 request for interlocutory appeal which the Trial Court granted. In its order granting Monumental's request for an interlocutory appeal, the Trial Court stated:

> 1. That the issues raised in this case concern construction of the contract of insurance and merit review … via interlocutory appeal. The Defendant has filed a Motion for Summary Judgment asserting that the basis for which insurance coverage was sought by Plaintiffs was excluded under the terms of the policy. Plaintiff[s] responded to the motion, arguing that coverage existed and benefits should be paid to Plaintiffs. The parties argued the motion in open court and this Court denied the motion.
>
> 2. That permitting an interlocutory appeal will prevent needless, expensive and protracted litigation, as contemplated by Rule 9(a) of the Tennessee Rules of Appellate Procedure. Further, that an appeal of this Court's order denying the Defendant's Motion for Summary Judgment represents a decision that will be challenged by Defendants (sic) at the conclusion of this case at the trial level and permitting review now will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed. Absent a review by the appellate court on an interlocutory basis, this matter will proceed through discovery and trial, and be appealed thereafter.
>
> It appears to this Court that the issues to be considered on appeal are:
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> (a) Whether the perforation of the bowel, which occurred during surgery for the removal of the Leiomyosarcoma tumor of the prostate constituted, under the terms of the policy "Medical or surgical **treatment** for sickness" … which caused "… directly or indirectly, wholly or in part …" Mr. Keller's death and would

constitute the basis for denial of coverage under the Accidental Death Policy's Exclusionary Clause.

(b) Whether the perforation of the bowel which occurred during surgery for the removal of the Leiomyosarcoma tumor of the prostate was an "Injury" as defined by the policy as … "bodily injury caused by accident." The injury must be the direct cause of loss and must be independent of all other causes. The injury must not be caused, or contributed to, by Sickness.

Or, alternatively,

(c) Does part (5) of the Exclusions, as follows:

> We will not pay a benefit which results directly or indirectly, wholly or partly from:
>
> (5) bacterial infection except through a wound accidentally sustained;

allow recovery, because the doctor perforated the bowel during surgery, which accidentally created a wound that created a bacterial infection that caused the death.

We then granted Monumental's Tenn. R. App. P. 9 request for an interlocutory appeal. Monumental restates issues (a) and (b) set forth above by the Trial Court and then claims that the Trial Court erred when it denied Monumental's motion for summary judgment. Plaintiffs raise issue (c) as set forth above by the Trial Court, claiming exclusion (5) actually permits recovery under the policy.

Discussion

In *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 330 (Tenn. 2005), our Supreme Court recently reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. The Court stated:

> The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed issues of fact. *Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988). Summary judgment is appropriate only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Penley v. Honda Motor Co.*, 31 S.W.3d 181,

> 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In reviewing the record, the appellate court must view all the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). And because this inquiry involves a question of law only, the standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. *See Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Teter, 181 S.W.3d at 337. Issues involving an insurance policy's coverage requires "the interpretation of the insurance policy in light of claims asserted against the insured." *Allstate Ins. Co. v. Jordan*, 16 S.W.3d 777, 779 (Tenn. Ct. App. 1999). These issues present a question of law which can be resolved by summary judgment when the relevant underlying facts are undisputed. *Id*. (citing *Standard Fire Ins. Co. v. Chester O'Donley & Assoc*., 972 S.W.2d 1, 5-6 (Tenn. Ct. App. 1998)).

As noted recently by this Court in *Mid-Century Ins. Co. v. Williams*, 174 S.W.3d 230 (Tenn. Ct. App. 2005):

> In construing insurance contracts, this Court is obligated to attempt to determine the intent of the contracting parties, and because the policy was drafted by the insurance company, we must resolve any ambiguity and doubt in favor of the insured. *NSA DBA Benefit Plan, Inc. v. Connecticut Gen. Life Ins. Co.*, 968 S.W.2d 791 (Tenn. App. 1997). Where the language of an insurance policy is reasonably susceptible of two meanings, we are obligated to give the particular language the interpretation most favorable to the insured. *Id*. at 795. Ambiguity in a contract is doubt or uncertainty arising from the possibility of the same language being fairly understood in more ways than one. *Id*.

Mid-Century Ins. Co., 174 S.W.3d at 240. While strictly construing exclusions against the insurer is a uniformly adhered to rule of contract construction, it "must yield to the primary rule that policies of insurance, like other contacts, are to be construed so as to give effect to the intention and express language of the policy." *Layne v. Pioneer Life Ins. Co. of Illinois*, No. 01-A-01-9809-CH-000457, 1999 WL 675133, at *4 (Tenn. Ct. App. Sept. 1, 1999), *no appl. perm. appeal filed*, (quoting *Travelers Ins. Co. v. Ansley*, 22 Tenn. App. 456, 124 S.W.2d 37, 42 (1938)).

In *Metropolitan Life Ins. Co. v. Smith*, 554 S.W.2d 123 (Tenn. 1977), the plaintiffs brought suit seeking double indemnity benefits under a life insurance policy claiming the decedent's death was accidental. The trial court directed a verdict for the insurance companies, a decision which this Court reversed. On appeal to the Tennessee Supreme Court, the judgment of the trial

court was reinstated. In *Metropolitan Life*, the insured, Dr. Smith, had a long history of heart problems after suffering a heart attack in 1961. *Id*. at 124. In January of 1972, Dr, Smith apparently fell and struck his head on a credenza. Thereafter, he frequently complained of headaches. *Id*. Dr. Smith was hospitalized five days later and died the following day. The only witness at trial was Dr. Nichopoulos, whose testimony was summarized by the Supreme Court as follows:

> [Dr. Nichopoulos'] professional opinion was that the traumatic injury sustained by Dr. Smith on January 23 was the "predominant cause of death," but throughout his testimony he stated that the advanced coronary artery disease was also a causative factor in producing death. He testified that a combination of the traumatic injury and the underlying disease produced death and that in his opinion neither, acting without the other, would have been fatal.
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> In response to questions by counsel for the insurance companies, Dr. Nichopoulos testified that the coronary artery disease and myocardial fibrosis from which the insured was suffering "contributed directly" to his death and that he presumed that without these pre-existing diseases, Dr. Smith probably would not have died.…
>
> The insured expired from congestive heart failure, resulting from a build-up of fluid or blood in the lungs. Dr. Nichopoulos testified that the head injury, through either pain or internal bleeding, could have triggered or set in motion this congestive heart failure. However, he testified that the advanced arteriosclerosis in the coronary arteries was the "main thing", from the standpoint of underlying disease, which contributed to the congestion.

Id. at 125.

The insurance policies in *Metropolitan Life* required the insurance company to pay double indemnity benefits if death occurred from bodily injury as the result "'directly and independently of all other causes' of 'external, violent and accidental means.'" *Id.* at 126. The policies also excluded from the double indemnity provision any death which resulted directly or indirectly from illness or disease of any kind. *Id.* In concluding that the double indemnity provisions did not apply to the facts in that particular case, the Supreme Court stated:

> [W]e are unable to find any material evidence from which a finder of fact could conclude that the pre-existing diseases did not contribute in an active and measurable degree to the death, or that death would have occurred had the coronary artery disease not been a substantial causative factor. Under these circumstances, we are of the opinion

> that the insurance carriers are not liable under the terms of their contracts.…
>
> Unlike the Court of Appeals, we are unable to conclude that the "exclusionary" language of the present policies should not be applied as written. We agree with that Court that in many situations such clauses may be redundant, and may add little, if anything, to the basic terms and provisions of the "coverage" clauses. Again, this depends upon the facts. Exclusionary terms in particular circumstances may refine or limit coverage, such as those exclusions dealing with the commission of a felony or an unscheduled plane flight. In the present case, the language of the exclusionary clauses makes clear the intention of the insurers, if such intention was not already manifest in the words "directly and independently of all other causes", that the carriers do not contract to provide double indemnity if it requires an active combination of a pre-existing disease and an accidental injury to produce death. The only professional opinion offered here was that such a combination was necessary and did in fact occur. It simply did not eliminate the advanced arteriosclerotic disease as a causative and material factor in the death of the insured, or leave conflicting permissible inferences in that regard.

Id. at 126, 128 (footnotes omitted).

Returning to the present case, the insurance policies require death to result from an "Injury" which must be "independent of all other causes" and "must not be caused, or contributed to, by Sickness." Sickness is then defined as an "illness or disease which results in a covered loss." Finally, an exclusion prohibits coverage for a loss which "results directly or indirectly, wholly or partly from … sickness or its medical or surgical treatment…." It is inescapable that the Decedent's death was not independent of all other causes, those causes being the underlying and likely fatal prostate cancer and need for immediate surgical intervention. The perforation occurred during surgery which was necessitated by the fact that the Decedent had a rare form of cancer and his likelihood of survival absent surgery was relatively slim. At the very least, his death resulted indirectly, if not directly, and partly, if not wholly, from a sickness and its resulting surgical treatment as defined in the policy.

We are quite aware that we must resolve any ambiguity in the insurance contract in favor of the insured. However, this rule of contract construction in no way authorizes us to rewrite an insurance policy. In order for us to conclude that there is or even might be coverage under the policy at issue in this case, we would have to altogether delete the relevant exclusion as well as the definition of sickness. Obviously, we are not free to make this revision. Under the undisputed material facts of this case, there simply is no question but that the Decedent's death resulted directly or indirectly, wholly or in part from his sickness and its resulting surgical treatment. In giving effect

to the intention of the parties and the express language of the insurance policies, we conclude that Monumental was entitled to summary judgment as a matter of law.

The final issue is Plaintiffs' claim that coverage under the policy is mandated by the exclusion which provides that no benefits are payable for a loss resulting from a bacterial infection "except through a wound accidentally sustained." We agree with Plaintiffs that this exclusion would not bar coverage in the present case. However, this does not mean that other exclusions are to be ignored and not applied. Even though this exclusion does not bar coverage, the immediately preceding exclusion clearly does so as we have discussed in detail.

We conclude that the undisputed material facts demonstrate that Monumental is entitled to summary judgment as a matter of law. Accordingly, the Trial Court erred when it denied Monumental's motion for summary judgment. The judgment of the Trial Court is reversed and Monumental is granted summary judgment.

Conclusion

The judgment of the Trial Court is reversed, Monumental is granted summary judgment, and this cause is remanded to the Trial Court solely for collection of the costs below. Costs on appeal are taxed to the Appellees, Wanda Keller and Charles E. Keller.

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D. MICHAEL SWINEY, JUDGE